

1986

B. R. Woodward, Marketing Corporation, Inc. v.  
Collins Food Service, Inc., a Delaware corporation,  
licensed to do business in Utah, and Collins Food  
International, a Delaware corporation : Reply Brief

Utah Supreme Court

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DOCKET NO. 860161-CA IN THE SUPREME COURT

OF THE STATE OF UTAH

B. R. WOODWARD, MARKETING  
CORPORATION, INC.,

Plaintiff/Appellant,

vs.

COLLINS FOOD SERVICE, INC.,  
a Delaware corporation,  
licensed to do business in  
Utah, and COLLINS FOOD  
INTERNATIONAL, a Delaware  
corporation,

Defendants/Respondents.

860161-CA  
Case No. 21026

REPLY BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF THE THIRD  
JUDICIAL DISTRICT COURT FOR SALT LAKE  
COUNTY, THE HONORABLE JUDITH M. BILLINGS PRESIDING

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**FILED**  
JUL 17 1986

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IN THE SUPREME COURT FOR THE  
STATE OF UTAH

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B. R. WOODWARD MARKETING CORPORATION, INC.,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	Case No. 21026
	)	
COLLINS FOOD SERVICE, INC.,	)	
a Delaware corporation,	)	
licensed to do business in	)	
Utah, and COLLINS FOOD	)	
INTERNATIONAL, a Delaware	)	
corporation,	)	
	)	
Defendants/Respondents.	)	

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REPLY BRIEF OF PLAINTIFF/APPELLANT

NATURE OF THE CASE

This action was brought by the Plaintiff/Appellant, B. R. Woodward Marketing, Inc., to recover commissions earned from the Defendants under the terms of a written agreement with the Defendants/Respondents.

DISPOSITION IN THE LOWER COURT

Upon a hearing held in the lower court before the Honorable Judith M. Billings, upon Defendants' Motion for Summary Judgment, the Court held that the Plaintiff had waived its right to the commissions provided by the contract and further held that there was no genuine dispute as to any of the factual issues presented by the holding that Plaintiff had

waived such contract rights.

ISSUE PRESENTED FOR REVIEW AND

RELIEF SOUGHT ON APPEAL

Plaintiff, B. R. Woodward Marketing, seeks a reversal of the summary judgment of the lower court and an order remanding this case to the lower court for further proceedings including trial, because Plaintiff did not waive his contractual right to sales commissions, there are clearly issues of fact upon which genuine disputes exist, and Defendant has not clearly shown that Plaintiff waived such contractual rights.

STATEMENT OF FACTS

1. Plaintiff and Defendants executed a Sales Representative Agreement on March 16, 1983, prepared by Defendants (Woodward Deposition P. 51), which provided in Paragraph 3(b) for an incentive commission. (R. 5-10).
2. At the time of the execution of the Agreement, Plaintiff was handling certain previous food purchaser accounts which it brought with it as it and such accounts changed sources of food distribution to the defendants. (Woodward Depo. at P. 52, 53, 58).
3. The parties executed an Amendment to the Agreement in June, 1984. (R. 11).
4. Plaintiff always maintained he was entitled to the incentive commission provided by Paragraph 3(b) of the Sales Representative Agreement and its officer, Brad Woodward, has so testified. (R. 29 and 113 and Woodward Depo. P. 49-50 and 61-

62). Plaintiff inquired about such commissions and ask when the payments were "going to happen". (Woodward Depo. at P. 50).

5. Plaintiff did not formally request incentive commissions under Paragraph 3(b) of the Sales Representative Agreement because during the term of the Agreement Defendants were having financial trouble. (Woodward Depo. at P. 49-50 and 62). An employee of Defendants told Plaintiff to wait "until things just level out". (Woodward Depo. at P. 50). The tenuous financial condition caused Plaintiff to be insecure about its new position with Defendants who could cancel its Agreement on 30 days notice. (R. 9 and Woodward Depo. at P. 49-50).

6. Following termination of the Sales Representative Agreement by Defendants, Plaintiff formally requested payment of the incentive commission which Defendants have refused to pay.

#### SUMMARY OF ARGUMENT

The evidence before the Court illustrates clearly that several material facts regarding the actions and knowledge of the parties are at issue and must be resolved before any determination of law can be made.

Defendants have claimed the defenses of both waiver and estoppel but have failed to demonstrate facts before the Court which established the necessary elements of either doctrine and therefore are not entitled to a judgment as a matter of law.

ARGUMENT

## Point I

THERE ARE VARIOUS GENUINE AND MATERIAL ISSUES OF FACT THAT ARE YET TO BE RESOLVED IN THIS CASE.

Although Defendant has stated in its Respondent's Brief that there are no material issues of fact existing in this case, several important facts are at issue and must be resolved before a determination of law can be made.

A. Whether Plaintiff Ever Made Demand for the Commissions Owed to it is a Fact at Issue.

Although Defendant claims that demand was never made for the commissions it owes to the Plaintiff, there is evidence before the Court which indicates that, although formal demand was not made, Defendant did have constructive notice of Plaintiff's desire to be paid, and this issue of fact must be settled before a decision of law can be made. Plaintiff has, by affidavit, stated that it reminded officials of Defendant Collins about its right to the extra commissions. While Defendant in its Respondent's Brief has claimed that this creates a conflict with Plaintiff's testimony at deposition, Defendant's brief also points out that this is simply not true. In response to Defendant's statement at deposition that Plaintiff had never made any request for money orally, or in writing, Plaintiff's officer Brad Woodward responded, "Other than a comment to Craig Hansen. But that was not even a



request. It was like, 'what the hell's going on' you know." (Woodward Depo. at P. 101); (Respondent's Brief at p.5.). Mr. Woodward has also testified by affidavit that Craig Hansen then advised him to keep quiet about the money owed to him for the time being.

Craig Hansen was Plaintiff's immediate superior at Collins Food Service, Inc. and was the head of the corporation in the Salt Lake City area. (Woodward Depo. at P. 24-28 and 32-34). Mr. Woodward's answers to the above question clearly shows that some attempt was made to remind the Defendant of its responsibilities under the contract, that no conflict exists between Mr. Woodward's deposition and the affidavits presented by Plaintiff, and that Plaintiff has not attempted to "manufacture" evidence.

Mr. Woodward's comments also clearly point out that there is a genuine issue of material fact to be resolved as to whether or not Defendant had constructive and/or actual knowledge regarding the monies owed to Plaintiff.

B. Whether the Defendant Relied on the Alleged Waiver by Plaintiff is a Fact of Issue.

As Defendant has pointed out in its Respondent's Brief, whether it relies on the theory of waiver or estoppel it must establish that it relied on the actions of Plaintiff as a waiver of its rights to commissions. There is no evidence of

fact whatsoever before the Court at this time as to whether such reliance took place, and the fact therefore remains at issue in this case.

C. Whether Defendant Substantially Changed Positions is a Fact at Issue.

In order for Defendant to prevail on the issues of estoppel or waiver, there must be a showing of some type of substantial change in position in reliance on the alleged waiver or actions of Plaintiff constituting an estoppel. Baggs v. Anderson, 528 P.2d 141, 143 (Utah 1974). There is no evidence of fact before the Court at this time that Defendant substantially changed position in any way, other than the bare assertion made in its Respondent's Brief that "Collins could have made a business decision to terminate Woodward pursuant to the thirty day notice period of the contract." (Emphasis added) (Respondent's Brief at p.8.) This fact therefore still remains at issue in this case.

D. Whether Defendant Relied to his Detriment is a Fact at Issue.

Any substantial change of position made by Defendant in reliance of alleged actions or waiver by Plaintiff, must have resulted in some detriment. Id. See also Strouss v. Simmons, 67 P.2d 1004 (Hawaii 1982). There is no evidence of fact before the Court at this time of any such detriment suffered by

Defendant, other than the bare assertion in its Respondent's Brief that the Defendant gave up the opportunity to terminate Plaintiff pursuant to the thirty day notice period of the contract. This, as will be pointed out below, resulted in no detriment to Defendant and was merely part of its contractual relationship with Plaintiff.

All of the above facts together with those set forth in plaintiff's opening brief, do remain at issue in this case and are material to the theories upon which Defendant claims it should prevail.

#### POINT II

EVEN IF ISSUES OF MATERIAL FACT DID NOT  
EXIST, DEFENDANT IS NOT ENTITLED TO  
JUDGMENT AS A MATTER OF LAW.

Although there remains a number of issues of fact which must be resolved in this case, even if said issues of fact were not present, Defendant must also prove that it is entitled to judgment as a matter of law. Hogan v. Industrial Design Corporation. 657 P.2d 751 752 (Utah 1982).

A. Plaintiff is not Estopped from Claiming Commissions Owed by Defendant as a Matter of Law.

Defendant's entire argument rests on the fact that Plaintiff has admitted that it made no formal request for payment of the monies owed to it by Defendant. Under Utah law however, "mere silence over a period of time will not raise an

estoppel where there is no legal or moral duty to speak."

French v. Johnson, 401 P.2d 315 (Utah 1965).

Although Defendant has attempted to show that a duty to speak existed on the part of Plaintiff, the cases it has cited are factually dissimilar and directly contrary to the case law found in Utah and to general contract principles. In Bjork v. April Industries, Inc., 547 P.2d 219 (Utah 1976), the Utah Supreme Court stated that, "demand (to enforce an agreement) is not necessary where both parties have equal knowledge of the contract provision, or where the defaulting party denies the obligation." See also 17 Am.Jur. 2d 794, Contracts Sec. 356. Defendant may not now be heard to argue that it was not aware of the contract provision in question as said contract was drafted by Defendant. As both the plaintiff and the Defendant were aware of the contract provision providing for the commissions due Plaintiff, it was not necessary for Plaintiff to make a formal demand of payment to protect its rights. Plaintiff's decision to not formally demand payments subject to the contract provision, as a result of the recommendation by his direct superior in the company, does not estop him from now claiming the amounts due to him by contract.

Even if Plaintiff had made some affirmative action upon which to base the theory of estoppel, there was no detrimental reliance on the part of Defendant. In Defendant's Respondent's Brief it is claimed that if Plaintiff had made demand for the commissions owed it under the contract, Defendant

could have terminated it upon thirty days notice, therefore it "detrimentally relied" on the Plaintiff's silence.

(Respondent's Brief at p.8). However, there is no evidence before this Court that Defendant substantially changed its position to its detriment, which is a necessary element of estoppel. "This requirement is not satisfied by the mere fact that (Defendant) indulged in the pleasant and euphoric assumption that he would not have to meet his obligations."

Baggs Supra at 144. Although Defendant could have given Plaintiff notice of termination, any monies paid to Plaintiff during its employment were paid pursuant to the contract between the parties for work rendered. Defendant was not damaged by Plaintiff's continued employment, but received its bargained for exchange.

B. Plaintiff did not Waive his Right to Claim the Additional Commissions Under the Contract.

As was pointed out and supported in Plaintiff's initial brief, waiver is the voluntary and intentional relinquishment of a known right. Such relinquishment must be permanent and, when dealing with a contractual obligation, must be in writing and supported by consideration. There can be no doubt after reading the testimony of Brad Woodward, an officer of the Plaintiff, as set forth before this Court in two affidavits and his deposition, that Plaintiff did not waive his right to the commissions as provided by the contract.

Mr. Woodward stated explicitly that he waited to claim the amounts owed to him upon the advice of his immediate superior because of the apparent financial problems of the Defendant. (Woodward Depo. at P. 49-50 and 62). Such a lack of affirmative action cannot imply an intentional and permanent waiver, nor were any of the other required elements met.

Defendant in its Respondent's Brief failed or refused to comment on these requirements of waiver, nor did they attempt to apply them to the factual situation before the Court. Defendant instead chose to compare waiver with the doctrine of estoppel, while citing cases that dealt only in estoppel. But, as has already been pointed out, the doctrine of estoppel is not applicable in this situation. Therefore, Defendant cannot base its defense on the doctrine of waiver as it has not provided any of the requisite elements.

#### CONCLUSION

There are several genuine issues of fact which must be addressed by the parties and decided by a finder of fact before any conclusions of law can be made in this case. Each of these issues of fact are material to the defenses of waiver and estoppel as proffered by the Defendant. Where such issues of fact exist, a summary judgment is not proper.

Even if no issues of fact existed in the case before the Court, Defendant is not entitled to judgment as a matter of law. Defendant has failed to show facts which constitute the necessary elements of the doctrines of waiver or estoppel. An

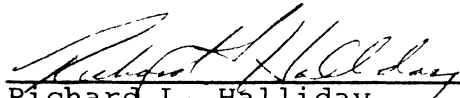
estoppel cannot result merely from the silence of an individual where there is no duty to speak, and there is no duty in the state of Utah to demand compliance of a contractual obligation. Defendant has also failed to show facts which indicate that it substantially changed position to its detriment while relying on the alleged silence of the Plaintiff.

Defendant has also failed to establish that Plaintiff made an intentional and permanent waiver of its contractual rights, in writing and supported by consideration, upon which Defendant relied. Because each issue before the Court must be examined in the light most favorable to the Plaintiff/Appellant, and because the Plaintiff has demonstrated that several material issues of fact exist and that Defendant is not entitled to a judgment as a matter of law, Plaintiff prays this Court reverse the decision of the lower court granting summary judgment and remand the case for further proceedings and trial.

RESPECTFULLY submitted this 15<sup>th</sup> day of July, 1986.

NEIDER & HUTCHISON

By:

  
Richard L. Halliday  
Attorney for Plaintiff/Appellant

CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered four copies of the foregoing Reply Brief of Appellant to David W. Slagle and Damian C. Smith, Attorneys for Defendants, 10 Exchange Place, 11th Floor, P.O. Box 3000, Salt Lake City, Utah this 16<sup>th</sup> day of July, 1986.

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